IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
January 13, 2009 Session

STATE OF TENNESSEE v. ZACHERY SCOT BROTHERTON

Direct Appeal from the Circuit Court for Marion County
No. 8051 J. Curtis Smith and Buddy D. Perry, Judges

No. M2008-00516-CCA-R3-CD - Filed March 18, 2009

The vehicle of the Defendant, Zachery Scot Brotherton, was stopped for a moving violation. The Defendant consented to a search of his person, which yielded marijuana. After a bench trial, the trial court convicted the Defendant of one count of felony possession of a Schedule VI controlled substance, marijuana, and one count of operating a motor vehicle without the required headlights and tail lamps. The trial court sentenced him as a Range I offender to two years of probation. The Defendant appeals, contending that the trial court erred when it denied his motion to suppress the marijuana seized during the search. After thoroughly reviewing the record and applicable authorities, we affirm the trial court's judgments.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Paul D. Cross, Monteagle, Tennessee, for the Appellant, Zachery Scot Brotherton.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Mark A. Fulks, Assistant Attorney General; J. Michael Taylor, District Attorney General; David O. McGovern, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION
I. Facts

The Defendant contends that the trial court erred when it denied his motion to suppress the evidence found during a search of the Defendant's person. At the hearing on the motion, the following evidence was presented: Chris Webb, an officer with the Kimball Police Department, testified that he had come into contact with marijuana "many" times during the course of his fourteen years in law enforcement and was familiar with its distinct odor. The officer testified that on New Year's Eve of 2006, after it was dark outside, around 7:19 p.m., he noticed the passenger's side brake light of the Defendant's vehicle was not working. Officer Webb

activated his blue lights, which also activated the police cruiser's camera, to initiate a stop of the vehicle. The Defendant pulled onto the road's left-hand shoulder and stopped.

Officer Webb intended to request the Defendant to move to the road's right-hand side, but, as he approached the Defendant's car, he smelled a "very strong odor of marijuana" coming from the window that was slightly opened. The officer asked the Defendant to step out of the car, and, because the officer had an uneasy feeling about the stop, he went back to his patrol car and requested assistance. Officer Webb returned to the Defendant to ask for his consent to pat him down for drugs. Another officer, Officer Winters, arrived while Officer Webb was patting down the Defendant. Officer Webb said that, while patting down the Defendant, he found a "large bulge in his crotch area." He asked him what it was, and the Defendant "dropped his head and said, 'That's my marijuana.'"

Officer Webb said that he handcuffed the Defendant and retrieved five small individual bags of marijuana from him. The Defendant told him that it should have been approximately four ounces, but it in fact weighed 4.8 ounces.

After this testimony, a DVD of the stop was played for the trial judge. After watching the video, Officer Webb added that he mentioned to the Defendant that he smelled marijuana, and the Defendant explained that he had a friend with him earlier in the night. The officer said he asked the Defendant if he could pat him down, and the Defendant said, "'Go ahead.'" The officer said that, when Officer Winters approached, Officer Webb asked Officer Winters to smell the Defendant. Shortly after that, Officer Webb discovered the bulge. Officer Webb testified he retrieved some of the marijuana immediately, and he wore gloves to retrieve the rest of the marijuana. Officer Webb said that the video showed that he initiated the stop of the Defendant's vehicle at 7:19:27 and that he found the marijuana at 7:22:36. He added that the Defendant was "very cooperative" and never asked the officer to stop the search.

On cross-examination, Officer Webb agreed the Defendant did not appear impaired when the officer stopped him. The officer acknowledged the Defendant was not read his *Miranda* rights until after he was arrested. Officer Webb also agreed marijuana can leave an odor in someone's clothing. Officer Webb said that, prior to finding the marijuana, he had not seen the Defendant place anything in that region of his body. The officer agreed that the Defendant had his back to the camera when the officer discovered the marijuana. Officer Webb described the area where the Defendant's car was stopped as a four lane road that was always busy.

After hearing the evidence presented, the trial court overruled the Defendant's motion to suppress. The evidence of the police officers' search of the Defendant was admitted at trial. The Defendant now contests the trial court's admission of the evidence.

At the subsequent trial, Officer Webb testified he was "coming up [the Defendant's] leg" and "felt a big bulge in [the Defendant's] crotch area."[1] When the officer asked the Defendant what the bulge was, the Defendant responded that it was his marijuana.

The Defendant's counsel contended in argument that "[a] general consent to search of a citizen's person in a public place does not include consent to touch the genital or breast areas." Following a bench trial, the trial court convicted the Defendant of one count of felony possession of a Schedule VI substance and one count of operating a motor vehicle without the required headlights and tail lamps.

II. Analysis

On appeal, the Defendant contends that the trial court erred when it denied his motion to suppress the evidence found during Officer Webb's search of the Defendant's person. The Defendant contends that Officer Webb exceeded the scope of his consent when he grabbed the Defendant's crotch, especially because this search was conducted on the side of a busy four-lane highway. The State counters that the Defendant consented to a pat-down search and then admitted that a bulge in his crotch was marijuana. On these facts, that State asserts, the officer did not exceed the scope of consent.

"This Court will uphold a trial court's findings of fact in a suppression hearing unless the evidence preponderates otherwise." *State v. Hayes*, 188 S.W.3d 505, 510 (Tenn. 2006) (citing *State v. Odom*, 928 S.W.2d 18, 23 (Tenn.1996)). On appeal, "[t]he prevailing party in the trial court is afforded the 'strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence.'" *State v. Carter*, 16 S.W.3d 762, 765 (Tenn. 2000) (quoting *State v. Keith*, 978 S.W.2d 861, 864 (Tenn.1998)). "Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *Odom*, 928 S.W.2d at 23. Our review of a trial court's application of law to the facts is *de novo*, with no presumption of correctness. *State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001) (citing *State v. Crutcher*, 989 S.W.2d 295, 299 (Tenn. 1999); *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997)). When the trial court's findings of fact are based entirely on evidence that does not involve issues of witness credibility, however, appellate courts are as capable as trial courts of reviewing the evidence and drawing conclusions and the trial court's findings of fact are subject to *de novo* review. *State v. Binette*, 33 S.W.3d 215, 217 (Tenn. 2000). Further, we note that "in evaluating the correctness of a trial court's ruling on a pretrial motion to suppress, appellate courts may consider the proof adduced both at the suppression hearing and at trial." *State v. Henning*, 975 S.W.2d 290, 299 (Tenn. 1998).

Included in the record on appeal are transcripts from the motion to suppress hearing and from the trial. We also note that while three of the four exhibits from trial are included, the fourth exhibit, the DVD of the traffic stop, is missing from the record. "It is the duty of the

[1] This Court may consider the evidence presented at the trial. *See State v. Henning*, 975 S.W.2d 290, 299 (Tenn. 1998).

appellant to prepare a record which conveys a fair, accurate, and complete account of what trans[pir]ed in the trial court with respect to the issues which form the basis of the appeal." *State v. Oody*, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991) (citing *State v. Miller*, 737 S.W.2d 556, 558 (Tenn. Crim. App. 1987); *see* T.R.A.P. 24(b). The Defendant did not include the DVD of the traffic stop in the record. "In the absence of an adequate record on appeal, this court must presume that the trial court's rulings were supported by sufficient evidence." *State v. Oody*, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991) (citing *Vermilye v. State*, 584 S.W.2d 226, 230 (Tenn. Crim. App. 1979)).

Further, from the evidence presented, the Defendant has not proven that the officer's search exceeded the scope of his consent to the search. At trial, the officer said that he noticed the "bulge" on the Defendant when he was "coming up his leg." This seems to conform with a usual pat-down search. *Terry v. Ohio*, 392 U.S. 1, 29-30 (1968) (an acceptable pat-down search includes a frisk of outer clothing without putting hands in pockets or under the outer clothing until the finding of contraband). Also, Exhibit number 2 to the trial depicts the officer standing next to the five sandwich baggies of marijuana found on the Defendant. Each of theses baggies, most appearing more than half-full, appear to contain quite substantial amounts of marijuana. When these baggies were bundled together, it would have created a quantity of marijuana that would be readily detectible in a routine pat-down search. Under these specific facts, we conclude that the evidence does not preponderate against the trial court's finding that the motion to suppress should be denied. The Defendant is not entitled to relief on this issue.

III. Conclusion

Based on the foregoing reasoning and authorities, we affirm the judgments of the trial court.

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ROBERT W. WEDEMEYER, JUDGE